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No. 53

In the Supreme Court of the United States

OCTOBER TERM, 1952

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 3053–94) is reported at 193 F. 2d 782, and the parts pertinent to this proceeding (R. 3057, 3075, 3083–85) appear at pages 787–788, 796, 801–802. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 283–298, 50–161) are reported in 86 N. L. R. B. 951, and the parts pertinent to this proceeding (R. 143–157, 293–294) appear at pages 1024–33, 959–960.

JURISDICTION

The decree of the Court of Appeals (R. 3095) was entered on February 11, 1952. The petition for a writ of certiorari, filed on May 6, 1952, was granted on October 13, 1952, limited to Question 2 of the petition. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Pursuant to agreements with local unions of the International Typographical Union, newspaper publishers pay printers in their employ for the reproduction of advertising matter which the publishers ordinarily do not use. The question presented is whether the International Typographical Union has engaged in an unfair labor practice in violation of Section 8 (b) (6) of the National Labor Relations Act. This turns upon

(a) Whether the fact the printers actually perform the work necessary for the reproduction of advertising matter takes the practice outside the category of "services which are not performed" within the meaning of the Section;

(b) Whether the fact that the reproduction clause appears as a part of the over-all settlement of the wages, hours, and working conditions of the printers takes the practice outside the mean-

ing of the phrase, "in the nature of an exaction," under the Section; and

(c) Whether the fact that the reproduction practice is incorporated in the collective bargaining agreement as the result of normal collective bargaining sessions without any evidence in the record of any need on the part of the union to threaten or to exert strike or like pressure is sufficient to hold that the union has not "cause[d] or attempt[ed] to cause [payment] in the nature of an exaction" within the meaning of Section 8 (b) (6).

STATUTE INVOLVED

The pertinent provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 141, *et seq.*), is Section 8 (b) (6). It provides that it shall be an unfair labor practice for a labor organization or its agents:

> to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

STATEMENT

The complaint alleged that, in violation of Section 8 (b) (6) of the National Labor Relations Act, the International Typographical Union

(ITU) caused newspaper publishers to pay printers in their employ for the reproduction of advertising matter which the publishers ordinarily did not use (R. 43, 46). The findings of fact pertinent to the complaint, which are undisputed, may be summarized as follows:

I

THE BOARD'S FINDINGS OF FACT

A. THE PRACTICE OF REPRODUCTION

The practice of reproduction, known as setting "bogus," prevails in newspaper composing rooms manned by printers represented by the ITU and its subordinate local unions. Reproduction operates as follows:

An advertiser arranges to transfer to a newspaper advertising matter in the form of a matrix, a cardboard impression of print, prepared in the composing room of another local newspaper or a local commercial printing shop (R. 143–144; 1536–37, 586). On receipt of a matrix by a newspaper, a plate is cast from it in the stereotype room, the plate is put on the press, and the advertisement is run off (R. 144; 424–425, 605). On the other hand, when an advertisement is received by a newspaper as hand-drawn or typewritten flat copy, instead of in matrix form, its publication requires that it first be sent to the composing room for printing (R. 144; 424). The result,

therefore, of receiving an advertisement in matrix form rather than as flat copy is to bypass the composing room of the publishing newspaper.

The process of reproduction, which applies only to local advertising and does not extend to national advertisements (R. 143, 144, n. 73, 146; 587, 686, 691, 1225), comes into play when a newspaper receives an advertisement in matrix form. When made from a matrix, a "tear sheet" of the published advertisement is taken, either from the proof or from the newspaper itself, and it is thereafter reproduced by the composing room as if the advertisement had been transmitted to it as flat copy (R. 144; 586, 668, 672). Using the tear sheet as a model, the advertisement is set in type, a form is made, a proof is run, and the proof is read and corrected, each step taken being precisely the same as if an original advertisement were being printed (R. 144; 1536, 1563, 586, 605, 668–9, 672–673, 678, 679, 1546–47).

The reproduced matter, which is a facsimile of the original advertisement as nearly as possible, becomes the property of the newspaper on completion (R. 144; 605, 798). While it may be used on rare occasions when an advertisement is rerun, it is ordinarily not used and not intended for use when made (R. 144; 1550, 1529, 1563, 586–588, 669–670, 673, 700, 718, 798). The type, instead, is thrown into what is known as the "hell box" and melted for reuse (R. 144; 1346–1347, 2470).

The time within which the reproduction of an advertisement is to take place, ranging from four days to three weeks from its original publication, is fixed by agreement between the newspaper and the local union of the ITU (R. 144; 1534, 1564, 423–424, 670, 2366). Live matter is always given priority over reproduction in the composing room and an effort is made to have reproduction performed during the slack periods of the day or week (R. 144; 1569, 603–604, 693–695, 719, 791–792). When reproduction cannot be completed during the time fixed by agreement, it accumulates until men are available to perform it, and advantage is taken of the slower seasons of the year to clean up reproduction during that period (R. 144–145; 1555–1556, 1531, 693, 791–792, 795).

All printers in the composing room, or in larger metropolitan areas where the composing room is departmentalized into a "news" and an "ad side" (R. 1570), all printers on the "ad side," participate in reproduction, but never on a full-time basis (R. 144 and n. 74; 1567–68, 686, 792–793). Time spent by printers in reproduction is equivalent to about two to five percent of their total work time (R. 147, 293; 1564, 1582, 2938, 680, 716, 1540–46, 2934–37, 2191–92). Reproduction is not performed at overtime rates, compensation for it being limited to straight time (R. 145; 1534, 1569, 587, 604, 696). When there is an accumulated backlog of reproduction, a newspaper may

not reduce its work force, nor may it decline to hire extra printers should they apply for employment during this period (R. 145; 682, 695). As a result of time spent on reproduction, publishers may have to hire extra printers, but the extra printers are not assigned to do merely reproduction work (R. 144, n. 75, 156, n. 90; 604–605, 634, 680, 695, 831, 2938).

B. THE HISTORY OF REPRODUCTION

The practice of reproduction had its origin in 1872 (R. 145; 1221). At that time, before the introduction of the linotype machine in 1890, printers were paid on a piecework basis (R. 145; 1221, 1223, 1224). Some employers followed the practice of borrowing composition from other firms, and, on the ground that the introduction of outside composition deprived the printers of work and pay, the printers began to resist the practice (R. 145; 1221–23). At the annual convention for 1872–73, the ITU decided that the "transfer of matter from one firm to that of another is detrimental to both proprietor and printer and should not be allowed"; succeeding conventions resolved "to discountenance the practice prevailing in several cities of loaning and borrowing matters between morning and evening newspapers"; and eventually the "General Laws" of the ITU incorporated a prohibition against the introduction of outside composition (R. 145; 1222–23).

The transmittal of advertisements in matrix form came with the introduction of the linotype process in 1890 (R. 145; 1223), and the custom evolved in the industry for newspapers to supply matrices to advertisers on request, free of charge or for a nominal fee (R. 144, n. 72; 1226). While linotype operation gradually brought about the elimination of piecework compensation (R. 1224), the ITU continued to maintain the principle that the ITU supplied men to get out all the work of the publisher, and that it was a denial of the opportunity to work, in violation of this principle, for a newspaper to publish an advertisement from a matrix which, prepared in another composing room, it had received free of charge (R. 145; 1223–24). But, instead of flatly prohibiting the interchange of matrices, the ITU required that local advertising received by the newspaper in matrix form be reproduced (R. 145; 1223–24).

The reproduction requirement has appeared in contracts between publishers and local unions of the ITU since before the turn of the century (R. 145; 735). In the early years the introduction of the practice was encouraged by some publishers (R. 145–146; 731). At that time, local advertisements were prepared almost exclusively at newspaper composing rooms, and the exchange of matrices was almost invariably between local newspapers, the same advertisement appearing in one newspaper as in another (R. 145; 706–

707). Advertisers tended, some publishers felt, to have their advertisements set in the composing room of the local newspaper having the best type and facilities (R. 146; 708, 731). The other newspapers, receiving the matrices there prepared without cost, obtained the same payment for running the advertisement as the newspaper which originated it, since newspapers charge for space, not labor (R. 146, 144 and n. 73; 1529, 681, 688, 1226, 1528–29). Without a reproduction rule to equalize labor costs the newspaper receiving the matrix thus obtained greater profits than the newspaper preparing it, which was regarded by some publishers as an unfair competitive advantage (R. 146; 731).

In more recent times, however, advertisers have with increasing frequency followed the practice of sending different copy to different papers, so that advertisements are no longer generally alike, and the practice has also been greatly extended of having advertisements set in the composing rooms of local commercial printing shops (R. 146; 708–709, 710). As a result the transfer of matrices between newspapers has diminished, and most reproduction work now arises from advertisements originally set in commercial shops (R. 146; 709).

C. THE PLACE THAT REPRODUCTION HAS TAKEN OVER THE YEARS IN THE BARGAINING POSITION OF THE NEWSPAPER PUBLISHERS AND THE ITU.

Over the years newspaper publishers have generally regarded the reproduction rule, which is incorporated in most agreements with local unions of the ITU (R. 440), as one item to be traded off in negotiations against other items of wages and hours (R. 146). Thus, in the negotiations in Chicago in 1923, the newspaper publishers insisted upon the elimination of reproduction, and offered to submit a proposal omitting it and providing in its stead for a compensating reduction of hours (R. 146; 1225). Woodruff Randolph, a negotiator for the Chicago local union and not then the president of the ITU, agreed to submit such a proposal to the union (R. 146; 1225). After several days, however, the newspaper publishers advised him that they had decided not to make the proposal and that they withdrew their objection to reproduction (R. 146; 1225). Similarly, in the negotiations in 1945, the business manager of the Chicago *Herald-American* agreed that reproduction was one of the items considered and discussed in arriving at the whole agreement, and that payment for reproduction was part of the compensation which printers received because of the services they performed for the publishers (R. 147; 687–688). So too, the production manager of the Knight Newspapers, Inc., publishers of the Chicago *Daily*

News, The Detroit *Free Press*, and the Akron *Beacon Journal* (R. 704–705), testified that "if the reproduction rule were entirely eliminated the amount of money represented by such elimination in savings to the publisher could very possibly be spread over the entire composing room operation and those working would benefit to that extent"—"the industry would be willing to pass a goodly portion of that on to the workers" (R. 147; 720). And the assistant business manager of the New York *Times*, in proposing the elimination of reproduction during the 1948 negotiations in New York, stated that its elimination "had a money value to us, and that we might be able to make a greater money offer for a contract that included no bogus than for a contract with bogus" (R. 147; 1530).

On the part of the ITU, the reproduction rule is incorporated in its "General Laws," which prescribe the standards to which its local unions must adhere in negotiations with employers (R. 56, 57–58), and in pertinent part the General Laws provide that (R. 143; 1707–08):

> The interchanging, exchanging, borrowing, lending, or buying of matter, either in the form of types or matrices, between newspapers, between job offices, or between newspapers and job offices, or vice versa, not owned by the same individual, firm or corporation, and published in the same establishment, is unlawful, and shall not

> be allowed, unless such type or matrices are reset as nearly like the original as possible, made up, read and corrected and a proof submitted to the chairman of the office. * * * The time limit within which borrowed or purchased matter, or matrices, are to be reset shall also be regulated by agreement between the employers and local unions. * * *
>
> * * * Subordinate unions may include in contracts provisions requiring reproduction, or exempting from reproduction, national (general) advertisements, plates and plate supplement matter, printed supplements, type, plates and matrices other than local advertisements.

In practice a minimum standard is incorporated into the General Laws only after the subject matter covered has won general acceptance in the industry, mainly as a result of collective bargaining by the larger local unions (R. 58; 2554–55, 2626–27). Its adoption into the General Laws is designed to bring stragglers into line, to stabilize working conditions in the industry, and to achieve industry-wide standardization considered desirable in view of the mobility of printers as a craft (*ibid*). The requirements of the General Laws are considered by the ITU to represent the floor upon which the structure of collective bargaining is erected (R. 58: 802–803, 1217–18, 1242–47, 1354–55, 1425, 2556–57). Local unions bargain for wages and economic conditions not covered by the laws, or only partially covered;

and where minimum conditions are prescribed, they may bargain for more than the minimum (R. 58; 1246–47; 1699–1700, 2556, 2559, 2627–28). But they may not, without contravening the "laws," bargain away what the "laws" provide (*ibid*).

To assure adherence to the General Laws, contracts to be proposed by a local union to an employer, and negotiated contracts to be executed by a local union, must first be submitted by the local to the ITU for approval (R. 59; 1218–19, 1244–45, 1247, 1305, 1329–31, 1421, 1434, 1700, 2628–30). Notwithstanding the requirement for ITU approval, there have been numerous occasions when local unions have consummated and signed non-approved contracts (R. 59; 2557–58, 2632). While the ITU is empowered to discipline non-conforming locals, by means of expulsion, suspension, or fine, there is no showing in the record that this power has ever been exercised (R. 59; 466, 2558, 2633–34). Apart from such discipline, substantial disadvantages inure to a local from its failure to secure ITU approval. The ITU will refuse to assist a local union in the enforcement of a non-approved contract, and it will not aid the local by strike authorization or payment of strike benefits (R. 60, 1270, 1675–76, 2558, 2633, 2684).

D. THE NEGOTIATIONS PERTAINING TO REPRODUCTION AFTER THE EFFECTIVE DATE OF THE ENACTMENT OF SECTION 8 (b) (6)

After August 22, 1947, the effective date of the enactment of Section 8 (b) (6) of the Act,

there was no change in the General Laws of the ITU pertaining to reproduction, and the proposals which the ITU authorized its local unions to make retained the general reproduction requirement existing in the previous agreements (R. 149; 1855, 2064–65). In fifteen representative cities (R. 79, 90, 91, 92, 94, 98, 100, 101, 102, 104, 106, 108, 115), the progress of negotiations between newspaper publishers and local unions of the ITU showed that, on the subject of reproduction, except for three localities, no issue at all was raised by the publishers concerning the retention of the reproduction practice (R. 149). Thus, at Chicago, extensive negotiations were conducted (R. 79–90), but reproduction was not mentioned except for a single passing reference, and the publishers made no proposal looking to its elimination (R. 588, 699, 728–729). In other cities, such as Detroit, Buffalo, and Albany, the written counterproposals submitted by the publishers during negotiations contained reproduction clauses (R. 149; 1103, 1123, 2366, 2392, 2296, 2324, 1040–41).[1]

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[1] At a meeting in September 1947 between the ITU and the American Newspaper Publishers Association (R. 384–385), the discussion was devoted primarily to the "closed shop," the ITU's "jurisdiction," and the "struck work" situation (R. 414). As the Publishers Association's representative testified, these were the "new issues that were created" by the amendments of the Act, and "while we discussed reproduction as something we would like to solve it was comparatively minor" (R. 423).

The three localities at which the issue of reproduction was raised during negotiations were Columbus, Georgia, Rochester, New York, and New York City. At Columbus, Georgia, there is no evidence that the publisher voiced any objection with regard to reproduction in the eighteen bargaining sessions between August 15, 1947, when negotiations began, until February 8, 1948, when the publisher submitted a counterproposal which, in addition to providing for the elimination of reproduction, also included many other changes over the preexisting agreement (R. 102–103, 148; 2529–37, 2462–93). On February 17, the local union of the ITU rejected this counter proposal principally because of these other changes, and reproduction was scarcely discussed, if at all (R. 148, 103; 2534, 2536, 2496–97, 2470–72). On February 18, after rejection of his proposal, the publisher posted a bulletin board notice which advised that he was the next day putting into effect a radical change in the previous practice of hiring and discharge, and also eliminating reproduction (R. 104; 2534–37, 2472–75, 2483–92, 2496–2500). On February 22, after the publisher refused to withdraw the notice, the local union went on strike, with the approval of the ITU, because of the change in the system of hiring (R. 104; 2539–41, 2535–37, 2479, 2490–93, 2496–99). Reproduction was not an issue in the strike, nor was it a factor in the union's decision to strike

(R. 148, 104, 150, n. 84; 2539, 2541, 2496–97, 2489).

At Rochester, New York, the publisher made no request in the 1948 negotiations to eliminate reproduction entirely, although he had unsuccessfully made such a request in previous years (R. 149; 1533, 1540, 1553). Instead, the publisher proposed a revision of the reproduction clause of the agreement to provide that if insufficient men were available to complete reproduction within the time limit fixed by the agreement, reproduction of such matter should not be required (R. 149; 1538). The local union of the ITU rejected this proposal, and requested renewal of the current agreement by which uncompleted reproduction accumulates until men become available to set it (R. 149; 1538–39). The record does not show the ground for the local's rejection of the proposal or the ultimate outcome of the negotiations (R. 149; 1532–57).[2]

At New York City, the publishers first formally requested the elimination of reproduction at the thirteenth bargaining meeting on April 2, 1948, although the subject had been incidentally mentioned before. The publishers stated that they wished to eliminate reproduction because they felt

[2] In its petition for certiorari (p. 6), petitioner refers to a strike called by the local union at Rochester in 1946 over the scope of the matter subject to reproduction (R. 1554). Since the strike was called in 1946, it occurred prior to the enactment of Section 8 (b) (6), and hence has little relevance to the policy pursued thereafter.

it was in violation of the Taft-Hartley Act and a wasteful and unnecessary practice besides. The local union of the ITU disagreed that it was unlawful, argued the need for reproduction to help it spread the work, stated it was part of the ITU General Laws, and expressed the view that the local's membership felt strongly about reproduction and that a contract calling for its elimination would not be approved by the membership. The publishers countered the local's argument by pointing out that the four-day limit within which reproduction was required to be set did not spread work much, expressed the view that other means could be devised to accomplish the same result, and suggested a greater money offer to compensate for loss of reproduction. After further discussion for some days, the publishers and the local "reached a meeting of the minds on the bogus clause" and agreed to retain reproduction but to extend the time limit within which it was to be set from four to seven days. (R. 148; 1480–82, 1528–31, 1559.)

At the hearing, Woodruff Randolph, president of the ITU, testified that he would not approve a contract which did not contain a reproduction clause (R. 149–150; 1250).[3] However, the course of negotiations on the issue of reproduction, where the matter was put in issue at all, did not reach

[3] There have been a few instances where reproduction clauses have been eliminated from agreements (R. 426, 1253).

the stage of an impasse calling for the intervention of the ITU (*infra*, pp. 40–41); hence, as the Board found, no occasion arose actually to test the ITU's position in that regard, and therefore it remained a matter of speculation as to what action or pressure, if any, the ITU would have authorized to enforce retention of its reproduction rule (R. 150).

E. THE ARGUMENTS URGED BY THE NEWSPAPER PUBLISHERS TO OPPOSE AND BY THE ITU TO SUPPORT THE REPRODUCTION PRACTICE

In opposition to reproduction, the publishers take the position that it is a wasteful and costly practice, creates extra work, is of no benefit whatsoever to them, and at times requires the employment of extra printers who might otherwise not be necessary (R. 147; 1528, 2928, and *passim* the publishers' testimony on reproduction).

The ITU, on the other hand, by way of economic justification for the reproduction practice, urges that it tends to stabilize employment by providing work during the slack days of the week; that it is unfair to expect the ITU to supply on busy days employees who may be without work on slower days; that it is to the employer's advantage to have always available a sufficient number of printers to take care of busy periods; that employees are entitled to produce the newspaper they are working on; that it prevents unfair competition among publishers resulting from advertisers hav-

ing their work performed at the newspaper having the best facilities and supplying a matrix free of charge to a competing newspaper; and that the elimination of the practice might cause the publishers to establish joint composing rooms to handle advertising work, thereby eliminating a substantial number of printers. (R. 147; 1223–24, 1226–27, 1256, 1341, 1343–44.)

In answer, the publishers assert that if reproduction were eliminated, advertising work could be rescheduled so as to eliminate lull periods; that present schedules take into consideration that reproduction work must be done; and that, with printers now in short supply in many localities and working at overtime rates, there are no lull periods and there is no need to spread employment. (R. 147–148; 694–695, 700, 719, 1540, 1550, 1554–55, 1577.)

To the last argument the ITU rejoins that periods of manpower surplus may return. (R. 148; 1342, 1343).

II

THE BOARD'S CONCLUSIONS AND ORDER

The complaint alleging the reproduction practice as a violation of Section 8 (b) (6) was dismissed by the Board on three independent grounds (R. 297–298, 293–294, 150–157):—(1) Reproduction was work actually done by the printers, who were regular employees devoting most

of their time to printing required by the publishers, and therefore reproduction was not in the class of "services which are not performed or not to be performed" (R. 150–156). (2) If it is assumed *arguendo* that the work done must be beneficial to the employer in order to satisfy Section 8 (b) (6), payment for reproduction work is nevertheless not "in the nature of an exaction" within the meaning of the section, because "payment for reproduction work" represents "an integral part of the wage structure of workers already standing in a proximate employer-employee relationship, not unlike a guaranteed weekly or annual wage arrangement, which is generally recognized as a legal demand, although it may and often does in any given situation, involve payment for non-productive time" (R. 294). (3) A demand made by a union in bargaining, which is accepted by an employer as part of the over-all settlement of the employment terms and which is unaccompanied by the need to apply pressure to gain its acceptance, is not sufficient to show that a union does "cause or attempt to cause an employer" to make a payment "in the nature of an exaction" (R. 156–157).

III

THE COURT'S DECISION

The court below affirmed the order of the Board dismissing the complaint alleging a violation of Section 8 (b) (6) of the Act (R. 3057, 3075,

3083–85). It held that "the only practice covered by 8 (b) (6) was the practice of demanding money where no *work* has been done," and in this case, "while the 'bogus' was not ordinarily used by the employer, the necessary work to compose it was actually done by the employee" (R. 3085). The court observed, in addition, that "the pay for 'setting bogus' was only for the time the employee actually worked in setting the 'bogus', amounting to approximately five percent of his total working time. He was a regular employee, not hired merely to set 'bogus', but hired to do composition work which the employer required" (R. 3085).

SUMMARY OF ARGUMENT

I. Section 8 (b) (6) requires only that work be performed. The employer's want or need for the work is immaterial. See the Board's brief in *National Labor Relations Board* v. *Gamble Enterprises, Inc.*, No. 238, this Term. Therefore, as the court below properly held in this case, while reproduction "was not ordinarily used by the employer, the necessary work to compose it was actually done by the employee. Requiring that the employer pay for such work was not a violation of Section 8 (b) (6)" (R. 3085).

II. Even if work done must have value in order to satisfy Section 8 (b) (6), and even if reproduction is assumed to be worthless, remuneration for it is nevertheless not prohibited because the

payment, in the circumstances of this case, is not "in the nature of an exaction" within the meaning of Section 8 (b) (6). Although reproduction comprises about five percent of the printers' work time, the printers are hired primarily to do production work required by the publisher, and this occupies 95 percent of their working time. Congress did not condemn as an "exaction" payment for nonproductive time which is but incidental to an over-all employment relationship beneficial to the employer. Payment for reproduction is therefore not an exaction inasmuch as it is part of the compensation attributable to the over-all employment relationship which in its total aspect is required by the employer.

III. Even if it is assumed that the fact that work is actually done does not suffice to meet the prohibition against "services which are not performed or not to be performed," and even if it is further assumed that the fact that the payment is for reproduction, which is an integral part of the over-all compensation for printers, does not remove the payment from being "in the nature of an exaction," nevertheless no violation of Section 8 (b) (6) has been established on this record. For the use of the means employed to induce the retention of the reproduction practice—ordinary bargaining—did not "cause or attempt to cause [payment] in the nature of an exaction."

Employer assent to reproduction, when procured through bargaining, is not the evil Section 8 (b) (6) seeks to erase. An employer may desire to retain reproduction and Section 8 (b) (6) leaves him free to do so. This being so, the bargaining process is the appropriate medium through which to thrash out the pros and cons of the choice. So long as a union resorts to no more than bargaining, unfortified by a threat or exertion of pressure, Section 8 (b) (6) does not prevent the union from winning the employer's concurrence to a practice otherwise within its purview.

The text and history of Section 8 (b) (6) accord with this view of its policy. The entire history of featherbedding regulation, from the Lea Act through the House Bill to Section 8 (b) (6) in its present form, shows that Congress has consistently excluded ordinary bargaining from the means prohibited to procure employer assent.

The exclusion of collective bargaining from the scope of the Section is verified by the conjunction of the phrase "cause or attempt to cause" with the phrase "in the nature of an exaction." A payment cannot be termed "in the nature of an exaction" when it is "caused" by a freely negotiated agreement. Nor can the process of bargaining preliminary to an agreement be described as an "attempt to cause" a payment "in the nature of an exaction."

ARGUMENT

I

SECTION 8 (B) (6) OF THE ACT REQUIRES ONLY THAT WORK BE PERFORMED

As we have shown in our brief in *National Labor Relations Board* v. *Gamble Enterprises, Inc.*, No. 238, this Term (hereafter called *Gamble*), Section 8 (b) (6) of the Act requires only that work be performed, and the employer's want or need for the work is immaterial. Accordingly, in this case the court below properly held that, while reproduction "was not ordinarily used by the employer, the necessary work to compose it was actually done by the employee. Requiring that the employer pay for such work was not a violation of § 8 (b) (6)" (R. 3085).[4]

To reach the reproduction practice under Section 8 (b) (6) it is necessary to read its terms as if unenacted provisions of the House bill had actually been adopted by Congress. Petitioner contends that, but for the reproduction practice,

[4] The complaint before the Board proceeded on the theory that reproduction is unused and not that the work is undone. The complaint alleged that reproduction violated Section 8 (b) (6) because the materials "reproduced are not used or not to be used" (R. 46). Section 8 (b) (6), however, is a prohibition against "services which are not performed or not to be performed." Hence, in stating that while reproduction "was not ordinarily used by the employer, the necessary work to compose it was actually done by the employee" (R. 3085), the Court gave the short and complete answer to the theory of the alleged violation.

"five out of every hundred men employed in composing rooms" could be eliminated. (Pet. Br. Below, p. 55.) The essence of its complaint, therefore, is the employment of more printers than needed. The House bill covered such a complaint, for in defining featherbedding practices, Section 2 (17) (A) specified requiring an employer:

> to employ or agree to employ any person or persons in excess of the number of employees reasonably required by such employer to perform actual services;[5]

But Congress refused to enact this provision in the belief that governmental regulation of the "number of men required in hundreds of industries and all kinds of functions" was unwise. (Bd. Br. in *Gamble*, pp. 37–39.) Petitioner would have Section 8 (b) (6) interpreted to embrace what Congress chose to reject.

Another definition of featherbedding contained in the House bill, but rejected by Congress, further confirms that Section 8 (b) (6) as enacted does not reach the reproduction practice. In part, Section 2 (17) (E) of the House bill defined featherbedding to mean requiring an employer:

> to pay or agree to pay any tax or exaction for the privilege of, or on account of, * * * using * * * any article, machine, equipment, or materials * * *.

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[5] H. R. 3020, 80th Cong., 1st Sess., April 18, 1947, Sec. 2 (17) (A), in 1 Leg. Hist. 170.

Under this provision it might well have been argued that conditioning the use of an outside matrix upon paying printers for resetting the advertisement as original composition constitutes imposing a "tax or exaction" for "using * * * any article, * * * equipment or materials." At the least, such a provision expresses a forthright congressional purpose to regulate union restrictions upon technological innovations. But Congress did not adopt this provision and Section 8 (b) (6) cannot be interpreted as if it had.

The refusal of Congress to curb the employment of unnecessary workers or to regulate restrictions on the use of equipment evidences its purpose to withhold all regulation of featherbedding—except to require work—pending its further study. As between the arguments advanced by the ITU and the newspaper publishers favoring and opposing the reproduction practice (*supra*, pp. 18–19), Congress was not yet ready to decide whether the publishers' protestations that the practice was wholly wasteful should be preferred to the ITU's position that it was a desirable means of preserving and spreading employment opportunities and of providing for stable work by eliminating lulls in production. It is significant, as the Board observed (R. 294, n. 28), that "reproduction practices in the printing industry, although well known,[6] were not referred

[6] See, Slichter, *Union Policies and Industrial Management*, pp. 181–183 (1941).

to in the debates as one of the industrial practices to be outlawed" by Section 8 (b) (6). That silence is much more naturally attributable to the reservation of the subject for future study than to an assumption that it is so clearly within the scope of Section 8 (b) (6) as to elicit not even a passing reference. In the light of the long tradition of reproduction, and its close and firm orientation into the employment structure of printers in newspaper composing rooms, reproduction is certainly not that "fairly clear case, easy to determine," where a union accepts "money for people who do not work" (93 Cong. Rec. 6441; in 2 Leg. Hist. 1535), the only case which Congress sought to reach through Section 8 (b) (6).

II

PAYMENT FOR REPRODUCTION IS PART OF THE OVERALL COMPENSATION OF PRINTERS AND IS THEREFORE NOT "IN THE NATURE OF AN EXACTION" WITHIN THE MEANING OF SECTION 8 (B) (6)

Even if "services which are not performed or not to be performed" includes work done that has no value, and even if it is assumed that reproduction falls within that class, remuneration for it is nevertheless not prohibited in the circumstances of this case because the payment here was not "in the nature of an exaction" within the meaning of Section 8 (b) (6). To illegalize causing a payment, Section 8 (b) (6) requires that the payment be "in the nature of an exaction"

as well as for unperformed services. Accordingly, as the Board held (R. 293), assuming "that the reproduction practice requires the employer to pay employees for time—equivalent to approximately 5 percent of their total work time—during which they perform no actual work in the statutory sense, it does not follow that such payment constitutes an 'exaction,' within the meaning of the section." Under the reproduction practice, "all employees engage in production work for the employer's benefit, but as an incident in such employment they demand and receive payment for certain non-production time" (R. 294). Where "the employment is for the primary purpose of doing production work—representing 95 percent of the employees' time—and the consideration for such employment includes payment, as in the case of a paid rest period, for a relatively short period of non-production time," the payment is not an exaction (R. 294). It is rather "an integral part of the wage structure of workers already standing in a proximate employer-employee relationship, not unlike a guaranteed weekly or annual wage arrangement, which is generally recognized as a legal demand, although it may and often does in any given situation, involve payment for non-productive time" (R. 294).

It is clear that Congress did not condemn as an "exaction" payment for non-productive time

which is but incidental to an over-all employment relationship beneficial to the employer. During the course of the debates, Senator Pepper expressed the view that paid rest periods and "call in" pay when men report and find no work were within the purview of Section 8 (b) (6), because each involved "a demand that payment be made for time when actually no work was performed" (93 Cong. Rec. 6446, in 2 Leg. Hist. 1545). Senator Taft disagreed, stating that neither was in the nature of an exaction. (*Ibid.*) Nevertheless, continued concern was expressed over these and kindred practices (93 Cong. Rec. 6498–99, 6514, in 2 Leg. Hist. 1570–71, 1590; see also 93 Cong. Rec. 7486). To dispel it, Senator Taft explained (93 Cong. Rec. 6859, in 2 Leg. Hist. 1623–1624):

> All that [Section 8 (b) (6)] does is to make it an unfair labor practice to cause or attempt to cause employers to pay money in the nature of an exaction for services which are not performed or not to be performed. A number of Senators have contended that this means that union requests for payment to employees of wages for lunch and rest periods or for waiting periods when machinery is being repaired will be illegal. It has also been stated that it would be a breach of this section for employees who are asked to report for work so as to be available as a relief squad in the event of emergency or

> need, to demand any money for their time. Of course this section does not affect such industrial practices, as such activities are done at an employer's request and for *valuable consideration incident to the employment itself.* [Emphasis supplied.]

The terms of the explanation embraces such practices as paid rest periods, lunch periods, "call in" pay, breakdown pay for periods when machinery failure or unavailability of supplies prevents production, paid vacation periods and sick leave, severance pay, or guaranteed wages for some fixed period. All involve payment for non-productive time, but none is to be regarded as an "exaction," for in each case the valuable services actually rendered by the employee supply the consideration for his wage demands even where the total payment is in part for nonproductive time.

In the Board's view these examples "incorporate by analogy, the well-established reproduction practice in the printing industry" (R. 293). In economic essence reproduction guarantees printers employment at five percent above the minimum extended by the publishers in exchange for performing work which the publishers require. It is evident that the remuneration for the required work is correspondingly reduced, for in proposing the elimination of reproduction, the publishers offer compensating increases in wages and the over-all pay scale takes account of the

money paid for reproduction (*supra*, pp. 10–11). Hence, no less than paid rest periods or guaranteed annual or weekly wages, payment for reproduction can be regarded as unearned only by isolating it from the total employment structure of which it is an integral part.

Petitioner has objected, however, that the "difference between the two demands is that the first is based on considerations of health, safety, and equity, beneficial both to employees and employers, while the 'bogus' practice merely lessens productivity and increases costs without any contributions remotely related to health, safety or equity." (Br. below, p. 59.) But an employer may with equal justification regard a guaranteed wage or severance pay as requiring wage payments from which he derives nothing beneficial. Conversely, the ITU makes a not implausible equitable argument for the retention of reproduction (*supra*, pp. 18–19). Whatever might be an ultimate judgment of the merits of the opposing contentions, to accept petitioner's test would require the Board to decide without guiding standards whether industrial practices, existing or proposed, were supported by considerations of "health, safety or equity." Congress withheld just this role from the Board. (Bd. Br. in *Gamble*, pp. 48–58.) The Board may not "sit in judgment upon the substantive terms of collective bargaining agreements." *National Labor*

Relations Board v. *American National Insurance Co.*, 343 U. S. 395, 404.

Accordingly, for the purpose of determining whether payment for nonproductive time is an exaction, the sole workable test is whether the payment is part of the compensation attributable to the over-all employment relationship which in its total aspect is required by the employer. As the court below observed (R. 3085), "In the instant case the pay for 'setting bogus' was only for the time the employee actually worked in setting the 'bogus,' amounting to approximately five percent of his total working time. He was a regular employee, not hired merely to set 'bogus,' but hired to do composition work which the employer required." Hence, payment for reproduction is not "in the nature of an exaction" within the meaning of Section 8 (b) (6).

III

ORDINARY BARGAINING TO INDUCE THE RETENTION OF REPRODUCTION IS NOT FORBIDDEN BY SECTION 8 (B) (6)

Even if it is assumed that the fact that work is actually done does not suffice to meet the prohibition against "services which are not performed or not to be performed," and even if it is further assumed that the fact that the payment is for reproduction, which is an integral part of the over-all compensation for printers, does not remove the payment from being "in the nature of

an exaction," nevertheless no violation of Section 8 (b) (6) has been established on this record. For the use of the means employed to induce the retention of the reproduction practice—ordinary bargaining—did not "cause or attempt to cause [payment] in the nature of an exaction."

The history of featherbedding regulation shows that Congress has consistently excluded employer assent procured by bargaining. The Lea Act regulating featherbedding in radio broadcasting made it unlawful "to coerce, compel or constrain" a licensee, 60 Stat. 89, 47 U. S. C. 506. To induce agreement by bargaining is not to "coerce, compel or constrain." The House bill, derived from the Lea Act, made it unlawful to engage in "any strike or other concerted interference with an employer's operations, an object of which is to compel an employer to accede to featherbedding practices."[7] To bargain is not "to compel" nor is it to engage in "any strike or other concerted interference with an employer's operations." This language of the House bill was the precursor to Section 8 (b) (6) in its final form. As the Board observed (R. 156), "Although the Conference bill substituted for these words 'cause or attempt to cause,' it also added the words, 'in the nature of an exaction.' The legislative history shows no disposition, on the part of the Senate at

[7] H. R. 3020, 80th Cong., 1st Sess., Sec. 12 (a) (3) (B) (April 18, 1947), in 1 Leg. Hist. 205.

least, to broaden the provisions of the House bill with respect to the prohibited form of activity.'" Instead, as Senator Taft explained in his written analysis, by prohibiting "exacting money for services not to be performed," Section 8 (b) (6) reaches a practice which "borders definitely on extortion." 93 Cong. Rec. 6443, in 2 Leg. Hist. 1540; see also, 93 Cong. Rec. 6859, in 2 Leg. Hist. 1624. To bargain is not to extort. The configuration of this history shows convincingly, therefore, that Congress did not include ordinary bargaining within the means prohibited to procure employer assent.

The exclusion of bargaining from the purview of Section 8 (b) (6) is further verified by the conjunction of the restricted phrase "cause or attempt to cause"[8] with the phrase "in the nature of an exaction." A payment cannot be termed "in the nature of an exaction" when it is "caused" by a freely negotiated agreement. Nor can the process of bargaining preliminary to an agreement be described as an "attempt to cause" a payment "in the nature of an exaction." A bargain struck by presumptive equals, unconstrained by a threat or exertion of pressure, has no attribute of an exaction.

There is no question that a publisher may well decide without constraint, as many in fact did

[8] See *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694, 703.

(*supra*, p. 14), that it is to his own best interest to retain reproduction.* There is equally no doubt that Section 8 (b) (6) leaves him free to do so. It does not compel the employer to root out practices he is content to abide. In this respect, bargaining for a featherbedding practice differs from bargaining for an end which the Act may make, of itself, unlawful, such as employer discrimination against an employee for either union or non-union activity. Compare Section 8 (b) (2); *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 38 (C. A. 2), affirmed, 341 U. S. 694. The employer has the option to continue or eradicate featherbedding, and the right which Section 8 (b) (6) confers upon him is to exercise this choice without the threat or exertion of pressure.

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* A publisher may desire to retain reproduction for many reasons. More than fifty years old, the practice is imbedded in the employment relationship obtaining in the composing room. The hours worked, the wages paid, and the attitudes engendered are all oriented in terms of this tradition. To eliminate reproduction might confront the publisher with the need to make compensating adjustments which he may regard as entailing more trouble than is worthwhile. Thus, should a publisher insist on eliminating reproduction, he might be confronted with a demand for a compensating reduction in hours and an increase in wages to equalize the printers' net loss in pay. Such an adjustment, recognized as just by some publishers (*supra*, p. 11), may result in the publisher not realizing a money gain from the elimination of

This being so, the bargaining process is the appropriate medium through which to thrash out the pros and cons of the choice. The publisher's freedom to retain reproduction necessarily implies that he is also at liberty to enter into an agreement with the union providing for it. What the employer may assent to, the union may propose. Compare *National Labor Relations Board* v. *American National Insurance Co.*, 343 U. S. 395, 408–409. Furthermore, the permissibility of an agreement presupposes the legitimacy of a discussion of its advantages and detriments. This is especially true since, as in this case, the consequence of agreement may be to gain the employer concessions on other issues, and result of disagreement may be to require the employer to improve other terms of employment. It would be artificial to say that the employer may consent to reproduction, but only for the reasons which occur independently to him, and that the union may not urge reasons for its retention upon him.

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reproduction, or a gain too negligible to warrant the wrangle. Similarly, to be advantageous to him, the publisher would have to reschedule composing room work to utilize the lull periods now occupied by reproduction (*supra*, pp. 6, 18–19), and he may believe such rescheduling to be more dislocating than helpful. So too, whether or not the publisher regards the ITU's economic arguments in favor of reproduction to be valid (*supra*, pp. 18–19), he may recognize that the printers feel strongly that reproduction is right and he may be unwilling to risk the resentment and the disruption of employee morale incident to its elimination. Any one of such factors, or a balance of them, may persuade a publisher to leave well enough alone.

In short, the freedom to contract on reproduction necessarily entails the right to negotiate about it. Hence, since Section 8 (b) (6) leaves the freedom to contract unimpaired, it is clear that it is permissible to win the employer's concurrence through bargaining, so long as it is unfortified by a threat or exertion of pressure.

Nor can it be successfully argued that obtaining employer consent to union-sought contractual provisions necessarily implies the use of the strike as the ultimate sanction to enforce the obtaining by the union of the particular demand. It is true that the use of the strike is the traditional weapon in the armory of the union. But it does not follow that in every relationship and in every situation the union is able, intends or would even be willing to use the strike to obtain its demands. For example, employees entering government service, be it federal, state or municipal, often agree not to strike. Yet this does not prevent them from organizing and discussing with the employing governmental officials new and improved terms and conditions of employment, nor from using bargaining sessions as means of persuading the officials of the correctness of their view. In non-governmental relationships, a union may contract not to strike for certain ends, but still leave itself free to discuss, persuade and negotiate to obtain those ends. The mere fact, therefore, that the strike or threat of strike is the weapon which a union normally has on hand or in reserve to en-

force its bargaining does not *ipso facto* mean that the union will undergo the strain of a strike if the employer, after negotiations, still continues to refuse to accede to a particular demand. Indeed, the essence of the bargaining process as it is known in modern industrial relations is mutual exchange and understanding of adverse positions. In each case, then, whether bargaining for a particular goal might or does entail the threat of strike pressure becomes a question of fact, not precluded by any preconceived notion of the role of the strike in industrial relations.

In this case the Board found (R. 156), "the record shows at most that [the ITU and its international officers] caused their subordinate unions to demand and insist upon the inclusion of reproduction clauses which had been in contracts for 50 years, and which, as the record also shows, had long been regarded as an item to be traded off against wages and hours in collective bargaining. What means of pressure, if any, [the ITU and its international officers] would have authorized if an employer, otherwise willing to come to terms with a local, had refused to yield to reproduction, the record does not disclose. That situation did not arise, and so far as this case is concerned remains speculative and hypothetical." The Board concluded that "to cause or attempt to cause" payment "*in the nature of an exaction*" requires "something more than an insistent demand in collective bargaining," "es-

pecially where that demand is for an item which has been traditionally regarded as 'part of the compensation to be paid to the employees in the unit as a group. To hold otherwise is to say that any demand in negotiation for an item which an employer or labor union does not want, but to which it accedes, however reluctantly, in order to reach a settlement on other issues, is 'in the nature of an exaction' " (R. 156–157).

This conclusion is clearly supported by the evidence. Thus, the complaint in this case is directed solely against the ITU and its international officers. No local union is named. The negotiations with the publishers pertaining to reproduction were conducted only by the local unions without ITU participation on the issue. Consequently, any responsibility which the ITU may bear can arise solely from the influence which it may exert over the local unions in their conduct of negotiations.

Such influence stems from the General Laws of the ITU prescribing minimum employment standards which the local unions may not consent to lower in bargaining with employers (*supra*, pp. 11–13). As they pertain to reproduction, the General Laws require the reproduction of local advertisements received in matrix form, leaving to the discretion of the local union such matters as the time within which the advertisement is to be reproduced (*supra*, pp. 11–12). The proposals which the ITU authorized its local unions to sub-

mit to employers contained reproduction provisions in conformity with the General Laws (*supra*, p. 14). As a result of the discipline that the ITU is empowered to exert against a disobedient local and the disadvantages which inure to a local from executing a non-approved agreement (*supra*, p. 13), coupled with the normal harmony which exists between the international and its local, it is unlikely that a local union will ordinarily deviate from the General Laws of the ITU.

Accordingly, publishers who propose the elimination of reproduction may well anticipate that local unions will bargain strongly for its retention, and will not, without the ITU's assent, agree to its elimination. However, the pattern of negotiation which the ITU prescribes equally assures that no authorized strike may result from disagreement at the local level, and that opportunity for further negotiation directly with the ITU exists. In the event of serious disagreement between a local union and an employer in contract negotiations, the local must notify the president of the ITU before any strike action is taken by the local. The president or his representative then directly participates in the negotiations and attempts to adjust the difficulty (R. 60; 736, 1239, 1296–1297, 1432–1433, 1674, 2630–2631, 2680). If the efforts of the president or his representative fail to adjust the difficulty (R. 60; 736, 1239, 1296–1297, ITU, upon the request of the local, may authorize a strike, but the local may conduct no strike with-

out such authorization (R. 60; 735–736, 1239, 1675–1677, 2631–2632, 2683–2684). Consequently so long as negotiations remain at the local level without ITU intervention, the sole authorized role of the local is to negotiate.

Negotiations on the subject of reproduction stayed at the local level; the intervention of the ITU was not required; bargaining on this subject never reached the stage of a strike threat or action or like pressure. The keynote to the publishers' attitude was struck at the September 1947 meeting between the ITU and the American Newspaper Publishers Association, called to discuss an over-all rapprochement on all controverted issues but not to negotiate a specific contract, at which the discussion of reproduction was described by the publishers' representative as "comparatively minor" (*supra*, p. 14, n. 1). During specific contract negotiations at the local level, where the subject was broached at all, discussion of reproduction remained "comparatively minor." Thus, in most cities, the publishers raised no issue concerning retention of reproduction, and in a number of them, the publishers' own counterproposals included provision for reproduction (*supra*, p. 14). At only three localities was reproduction affirmatively raised by the publishers. At Rochester, New York, the publisher proposed, not the elimination of reproduction, but merely a revision of the practice, and the record does not disclose the outcome of nego-

tiations (*supra*, p. 16); at Columbus, Georgia, the publisher instituted a radical change in the hiring and discharge practice together with the elimination of reproduction, but the strike called by the local, approved by the ITU, was directed solely against the change in hiring, reproduction being neither an issue in the strike nor a consideration in the decision to call it (*supra*, p. 15); at New York City, the publishers' proposal to eliminate reproduction was compromised by extending the time within which advertisements could be reproduced (*supra*, pp. 16–17).

Accordingly, at most, nothing except negotiation transpired to cause or attempt to cause the publishers to retain the reproduction practice. The New York City negotiations epitomize the maximum which may be inferred from the ITU's role (*supra*, pp. 16–17). The argument of the publishers that reproduction was in violation of law was countered by the local's assertion of its legality; in answer to the publishers' argument that it was an unnecessary and wasteful practice, the local justified it as desirable in spreading work among the printers; the publishers rejoined that reproduction did not spread work much, that other means could be devised to achieve that end, and offered to increase wages to compensate for eliminating reproduction; the local pointed to its members' strong preference for reproduction and to the requirement of the ITU laws. The upshot of the bargaining was, as the publishers' repre-

sentative testified (*supra,* p. 17), that eventually the negotiators arrived at a compromise and "reached a meeting of the minds on the bogus clause."

Consequently, on this record, while it might be said that the ITU caused its local unions to negotiate for the retention of reproduction, the concurrence of the publishers, insofar as it is attributable to the ITU, was caused by negotiation rather than by "exaction." It is true that at the hearing the ITU president testified that he would not approve a contract which did not contain a reproduction clause (*supra,* p. 17). But, as the Board found (R. 149–150, 156), the course of negotiations on the local level never presented the occasion to put this question to the test, so that the pressure, if any, that the ITU would have authorized to retain reproduction remains speculative and hypothetical. The true significance of the statement made by the ITU president is that, except in answer to a question on cross-examination at the hearing, there was no cause for him during actual negotiations in many cities to state the ITU's position. Hence, unlike the demonstrated fixed resolve of the ITU to remain contractually free to strike if a publisher hired a nonunion printer (R. 284–287), the need did not arise for the ITU to articulate a final position on reproduction beyond the initial step of requiring its local unions to bargain for its retention. Accordingly, the economic pressure, if any, to which the ITU

would have resorted to compel retention of reproduction remains a guess which cannot be answered on this record.

It is therefore clear that this record shows no more union activity in behalf of the retention of reproduction than discussions at the bargaining table. In no sense can such discussions by the local unions be considered "in the nature of an exaction," or, as Senator Taft put it, "border[ing] definitely on extortion" (p. 34, *supra*). An employer who is not prohibited by the statute from entering into such an agreement clearly may be persuaded to do so where the means used go no further, as the Board found, than the normal bargaining discussions.

CONCLUSION

For the reasons stated it is respectfully submitted that the decision below should be affirmed.

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